

STATE OF MICHIGAN
COURT OF APPEALS

ANDRIE, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED

February 1, 2011

No. 291758

Court of Claims

LC No. 08-000061-MT

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

In this Single Business Tax Act (SBTA) dispute regarding the state's authority to tax a transportation company with vessels plying the waters of the Great Lakes, plaintiff appeals by right from the order of the Court of Claims granting defendant's motion for summary disposition. We affirm.

On appeal, defendant alleges that the Court of Claims erred in granting summary disposition under MCR 2.116(C)(8) on three grounds: (1) whether defendant violated plaintiff's equal protection rights, (2) whether tax on cruise-by miles violated due process and the Commerce Clause of the United States Constitution, and (3) whether sourcing income as Michigan revenue is appropriate for purposes of apportionment when business income is earned beyond three miles of Michigan's shorelines.

The SBTA, MCL 208.1 *et seq.*,¹ is not a tax on income, but rather, a tax placed on the value-added portion of a product, which allows for certain exclusions, exemptions, and industry-specific adjustments. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005). "Value added" is considered to be the increase in the value of goods and services created by whatever a business does to them between the time of purchase and the time of sale. *Id.*; see also *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989), *aff'd* 498 US 358; 111 S Ct 818; 112 L Ed 2d 884 (1991). "In short, a value-added tax is a tax upon business or economic activity." *ANR Pipeline*, 266 Mich App at 198.

¹ The SBTA was repealed by 2006 PA 325, effective December 31, 2007.

“As a general principle, a State may not tax value earned outside its borders.” *Trinova*, 433 Mich at 151, quoting *ASARCO, Inc v Idaho State Tax Comm*, 458 US 307, 315; 102 S Ct 3103; 73 L Ed 2d 787 (1982). “A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter.” MCL 208.41. The apportionment formula provides the amount of business activity a taxpayer has had within Michigan over the taxable year, and dictates what portion of the taxpayer’s tax base should be subject to Michigan tax.

In the present case, the parties agree that the applicable method of apportionment is found in MCL 208.57, which provides as follows:

(1) In the case of a taxpayer under section 56 other than one whose activity consists of the transportation of oil or gas by pipeline, the tax base attributable to Michigan sources shall be that portion of the tax base of the taxpayer derived from transportation services wherever performed that the revenue miles of the taxpayer in Michigan bear to the revenue miles of the taxpayer elsewhere. A revenue mile means the transportation for a consideration of 1 net ton in weight or 1 passenger the distance of 1 mile. The tax base attributable to Michigan sources in the case of a taxpayer engaged in the transportation both of property and of individuals, shall be that portion of the entire tax base of the taxpayer which is equal to the sum of his passenger miles and ton mile fractions, separately computed and individually weighted by the ratio of gross receipts from passenger transportation to total gross receipts from all transportation, and by the ratio of gross receipts from freight transportation to total gross receipts from all transportation, respectively.

This dispute involves the “revenue miles of the taxpayer in Michigan” and how that value should be calculated for plaintiff’s business activity during the years in question.

Plaintiff first argues on appeal that the court should not have granted summary disposition on the question whether defendant violated plaintiff’s right to equal protection by applying different apportionment schemes. We disagree.

We review a trial court’s decision on a motion for summary disposition de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). This motion should be granted if the plaintiff has not stated a claim upon which relief can be granted and no factual development could possibly justify recovery. *Id.*, citing *Spiek v Dep’t of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Equal protection of the law is guaranteed by both the federal and Michigan constitutions. *Brinkley v Brinkley*, 277 Mich App 23, 35; 742 NW2d 629 (2007). The purpose of equal protection is to ensure every person against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution. *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). The equal protection guarantee requires that persons under similar circumstances be treated alike, but there

is no requirement that persons under different circumstances be treated the same. *El Souri v Dep't of Social Servs*, 429 Mich 203, 207; 414 NW2d 679 (1987).

When a legislative classification is challenged as an equal protection violation, we apply one of three tests, depending on the nature of the alleged classification. *Heidelberg Bldg, LLC v Dep't of Treasury*, 270 Mich App 12, 18; 714 NW2d 664 (2006). Absent the implication of a suspect classification or a fundamental interest, an equal protection challenge is examined under the rational basis test. *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004). The rational basis test examines whether a challenged statute creates a classification scheme that is rationally related to a legitimate governmental purpose. *Harvey v State*, 469 Mich 1, 7; 664 NW2d 767 (2003). The burden of proof is on the person attacking the legislation to show that the classification is arbitrary. *Id.* A rational basis for legislation exists when any set of facts is known or can be reasonably assumed to justify the discrimination. *Crego v Coleman*, 463 Mich 248, 259-260; 615 NW2d 218 (2000).

Notably, “[a] taxpayer challenging a tax on constitutional grounds must overcome a strong presumption in favor of the taxing statute’s validity and point out with specificity the constitutional provision that is violated.” *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 414; 488 NW2d 182 (1992). A tax statute must be shown to clearly and palpably violate the law before it is declared unconstitutional. *Id.*

Here, plaintiff did not overcome the strong presumption of constitutionality, as it did not prove that similarly situated taxpayers were treated differently. Under MCL 208.57(1), a transportation company is required to apportion revenue miles in Michigan with revenue miles elsewhere. However, MCL 208.57(2) provides the following:

If it is shown to the satisfaction of the commissioner that the foregoing information is not available or cannot be obtained without unreasonable expense to the taxpayer, the commissioner may use such other data which may be available and which in the opinion of the commissioner will result in an equitable allocation of the receipts of this state.

Plaintiff fails to recognize the above section, and does not question the constitutional validity of this section. Based on MCL 208.57(2), it is plausible that similarly situated taxpayers took advantage of the above section and successfully proved to the commissioner that they could not economically ascertain revenue mileage as required by MCL 208.57(1), and opted to “use such other data . . . which in the opinion of the commissioner will result in an equitable allocation of the receipts of this state,” MCL 208.57(2), which could reasonably result in different apportionment methodologies being approved by the commissioner. The purpose of this law is to ensure that all transportation taxpayers arrive at an equitable allocation of the receipts of this state, which is rationally related to a legitimate governmental purpose of revenue collection. The law, as written, provides that taxpayers could be treated differently, without an equal protection violation resulting therefrom.

Plaintiff next argues that the court erred in granting summary disposition on the question of whether taxation of revenue miles beyond three miles from Michigan’s shoreline violates the

Due Process and Commerce Clauses of the United States Constitution, and that these revenue miles were properly “in Michigan” for purposes of apportionment. We disagree.

Under both due process and the Commerce Clause, there must be “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” *Allied-Signal, Inc v Director, Div of Taxation*, 504 US 768, 777; 112 S Ct 2251; 119 L Ed 2d 533 (1992). Where there is a tax on an activity, there must also be a rational relationship with the income attributed to the state. *Id.* at 778. The state’s power to tax the taxpayer’s activities is justified by the protection, opportunities, and benefits the state confers upon those activities. *Id.* If a business has the proper connections under the Due Process Clause and the Commerce Clause, then the state has jurisdiction to tax the activity.

In *Complete Auto Transit, Inc v Brady*, 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977), the United States Supreme Court established a four-part test that a state must satisfy to be compliant with the Commerce Clause. The four-part test requires the following: (1) there must be a substantial nexus with the taxpayer and the state, (2) the tax must be fairly apportioned, (3) the tax cannot discriminate, and (4) the tax must be fairly related to the services provided by the state. *Id.* at 279.

Here, plaintiff questions whether the tax is fairly apportioned, and specifically argues that the law is not externally consistent. A law is fairly apportioned if it is internally and externally consistent. Under the externally consistent prong, this tax will be upheld only if the statute taxes that portion of revenues that reasonably reflect the in-state component of the activities. This test is a practical inquiry that looks for fair apportionment between taxpayers.

In order to successfully prove that this statute was not externally consistent, plaintiff needed to show that the tax was manifestly unfair and out of all appropriate proportions to the business transacted in the state. Plaintiff contends that the tax was unfair because it taxed plaintiff on cruise-by miles where no benefit accrued, and discriminated against plaintiff where vessels of other maritime transportation companies that did not stop at Michigan ports were not taxed. However, plaintiff is uniquely situated in comparison to vessels that do not stop at Michigan ports. In fact, part of the benefit that plaintiff obtains from the state is the use of the ports and convenience of the inland and port infrastructure.

Nevertheless, if plaintiff’s vessels were, in fact, “in Michigan” as required by the statute, any contention that the tax was not fairly apportioned would be nullified because the apportionment formula provided in MCL 208.57 was created specifically to fairly apportion the tax based on each taxpayer’s activity in the state. Thus, the crux of this issue is whether plaintiffs’ vessels were “in Michigan.”

Plaintiff relies on *In re Income Tax Cases*, 157 Mich App 525; 403 NW2d 182 (1987), for the proposition that income earned on the Great Lakes was not income earned “in Michigan” and such income could not be taxed. The *In re Income Tax Cases* Court considered whether seamen, or the wives of seamen, employed on the Great Lakes had a sufficient connection with the State of Michigan that would subject them to Michigan income tax. This Court recognized that the Legislature provided no formula for apportioning income between Michigan and other states. In agreeing with the Tribunal’s decision, the Court ruled that income earned merely from

services provided on ships plying the Great Lakes did not provide a sufficient nexus to justify the imposition of a tax for that activity. *Id.* at 531-533.

The present case is distinguishable from *In re Income Tax Cases* on several grounds. First, the taxpayers in *In re Income Tax Cases* were not residents of Michigan, and therefore there was no clear connection between the taxpayers and the state. Second, *In re Income Tax Cases* dealt with Michigan income tax, whereas this case deals with the Michigan SBT. Third, the statute at issue here clearly provided a method of apportionment, which was not present in the applicable statute in *In re Income Tax Cases*. And finally, plaintiff here was not merely providing services on ships plying the Great Lakes, but instead was earning business income based on its services provided in the Great Lakes, and its primary place of business was in Muskegon, Michigan. The *In re Income Tax Cases* Court ruled in favor of the taxpayer based on the state's failure to specify apportionment standards, and it also recognized that the state had not demonstrated what services it rendered to plaintiff. In the present case, plaintiff clearly has a sufficient nexus with the state based on its primary location in Muskegon.

We question plaintiff's reliance on *In re Income Tax Cases* based on the factual distinctions and also based on our finding that the disposition of that case was dependent upon a combination of the taxpayer's lack of residency in Michigan and the lack of apportionment in the taxing statute, factors not present here.

The goal in statutory construction is to discern and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The intent of the Legislature is most reliably evidenced through the words used in the statute. *Id.* If the language in the statute is unambiguous, judicial construction is neither required nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). However, if a statute is ambiguous, judicial construction is appropriate. *Adrian School Dist v Michigan Pub School Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). A statute "'is ambiguous only if it 'irreconcilably conflict(s)' with another provision or when it is *equally* susceptible to more than a single meaning.'" *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177-178 n 3; 730 NW2d 722 (2007) (emphasis in original), quoting *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004), overruled in part by *Peterson v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009).

A statute should be construed "as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). "Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest." *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998), overruled in part on other grounds in *Rafferty v Markowitz*, 461 Mich 265; 602 NW2d 367 (1999); see also *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 675; 760 NW2d 565 (2008) ("a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result").

The statute in question here does not define "in Michigan." Because this term is not statutorily defined, it should be accorded its plain and ordinary meaning within the context of the statute. MCL 8.3a; *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). The plain and ordinary meaning of "in Michigan" would include anything that occurs within the state

boundaries. On the contrary, plaintiff argues that the Great Lakes are “high seas” and not within Michigan’s taxing jurisdiction. We disagree.

Plaintiff correctly points out that *United States v Rodgers*, 150 US 249, 14 S Ct 109, 37 L Ed 1071 (1893), characterized the Great Lakes as “high seas” subject to admiralty jurisdiction. Notably, this characterization is unique based on the fact that the Lakes are also within the state boundary line. Other references to “high seas” are to those lands not governed by a state authority. Nevertheless, the tax in question does not impermissibly interfere or intrude with the federal admiralty jurisdiction, and there is no indication that the admiralty authority would occupy the field and preempt a state from apportioning a tax based on travel on the high seas within a state’s boundaries. The authority to tax plaintiff is warranted based on plaintiff’s residence and primary location in Muskegon. The apportionment formula established in MCL 208.57 is used merely for ease of administration in determining what portion of the taxed activity occurred in Michigan. Therefore, we adopt the plain and ordinary meaning of “in Michigan” to include activity occurring within the State’s geographical boundaries to avoid an absurd result. *McAuley*, 457 Mich at 518.

Based on the apportionment formula, and our conclusion that defendant properly sourced the revenue miles as “in Michigan” for purposes of apportionment, we conclude that plaintiff has not overcome the strong presumption of constitutionality, and has not demonstrated that the statute violates due process or the Commerce Clause.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad